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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FREDDIE GAINES, et al.,

2:12-CV-2154 JCM (GWF)

Plaintiff(s),

v.

FLAGSTAR BANK, FSB, et al.,

Defendant(s).

ORDER

Presently before the court is defendant Flagstar Bank, FSB's ("Flagstar") motion to dismiss. (Doc. # 6). Plaintiffs filed a response in opposition (doc. # 13), and Flagstar filed a reply (doc. # 15).

I. Background

Plaintiffs Freddie and Billie Gaines purchased real property located at 2141 East Weber Way, Pahrump, Nevada. (Doc. # 1, Ex. A, Compl. at ¶¶ 7-8). Flagstar loaned plaintiffs money to purchase the property. (*Id.*). The loan was secured by a deed of trust recorded on October 23, 2008.¹

Beginning in 2012, plaintiffs "fell behind on their mortgage payments." (*Id.* at ¶ 9). Due to their default, plaintiffs were served with a notice of default and election to sell on February 15, 2012. (*Id.* at ¶ 9).

¹ The court judicially recognizes all of the following properly recorded documents attached to defendants' motion to dismiss: the deed of trust; the loan; notices of default and election to sell; substitution of trustee; certificate of compliance with the foreclosure mediation program; state court documents and orders; and, notice of trustee's sale. See *Intri-Plex Technology, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment as long as the facts are not subject to reasonable dispute.").

Both parties then participated in the Nevada Foreclosure Mediation Program. (*Id.* at ¶ 10). Plaintiffs further admit that “the results [of the mediation] were not favorable to Plaintiffs.” (*Id.* at ¶ 11). By unfavorable, the plaintiffs really mean that the mediation resulted in a certificate allowing defendant to foreclose on the premises.

Plaintiffs filed a tardy “petition for judicial review” of the mediation proceedings in state court, which that court dismissed. (*See* doc. # 1, Ex. A at p. 110-12). Defendants then foreclosed on the property on or about October 22, 2012. (Compl. at ¶ 21).

II. Legal Standard

A court may dismiss a plaintiff's complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted). “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 1949. Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949.

Where the complaint does not “permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief.”

1 *Id.* (internal quotations and alterations omitted). When the allegations in a complaint have not
 2 crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550
 3 U.S. at 570.

4 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 5 1216 (9th Cir. 2011). The *Starr* court stated, "First, to be entitled to the presumption of truth,
 6 allegations in a complaint or counterclaim may not simply recite the elements of a cause of action,
 7 but must contain sufficient allegations of underlying facts to give fair notice and to enable the
 8 opposing party to defend itself effectively. Second, the factual allegations that are taken as true must
 9 plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to
 10 be subjected to the expense of discovery and continued litigation." *Id.*

11 **III. Discussion**

12 At the outset the court notes that the complaint alleges seven causes of action. Flagstar's
 13 motion to dismiss raises arguments pertaining to only three of the seven causes of action.
 14 Additionally, this court previously denied a temporary restraining order in this case. (Doc. # 14).
 15 In that order, the court stated that it would resolve the remaining injunctive claim when resolving
 16 the motion to dismiss. Therefore, this order covers only four of the seven causes of action.

17 *A. Fraudulent Misrepresentation*

18 Under Nevada law, the elements of fraudulent misrepresentation are the following: "(1) a
 19 false representation made by the defendant; (2) defendant's knowledge or belief that its
 20 representation was false or that defendant has an insufficient basis of information for making the
 21 representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the
 22 misrepresentation; and (4) damage to the plaintiff as a result of the relying on the misrepresentation."
 23 *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446, 956 P.2d 1382, 1386 (Nev. 1998).

24 Additionally, fraud claims must meet the heightened pleading standard under Federal Rule
 25 of Civil Procedure 9. Allegations of fraud must be accompanied by "the who, what, when, where,
 26 and how of the misconduct charged." *Yess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
 27 2003).

1 Plaintiffs' complaint does not state a single specific fact substantiating their fraudulent
2 misrepresentation claim. For example, plaintiffs' complaint states:

3 45. Defendant has made, on numerous occasions as delineated herein, false
4 representations of material fact to Plaintiffs which they knew to be false.

5 46. In particular, Defendants [sic] represented that they would work in good faith in the
6 proceedings in Case No. CV 33883, when in reality, they were taking proactive steps
7 at the same time to conclude the foreclosure sale of Plaintiffs' residence.

8 47. Defendant's representations in dealing with Plaintiff [sic] contained material
9 omissions in that Defendant intended all along to violate the State of Nevada FMP
10 and not participate in good faith in the ongoing judicial review proceedings in Case
11 No. CV 33883.

12 (Compl. at ¶¶ 45-47). Plaintiffs' allegations cannot meet the heightened pleading standard required
13 by a fraudulent misrepresentation claim. There are no specific facts, much less a who, what, when,
14 where, and how.

15 Plaintiffs's fraudulent misrepresentation cause of action fails to state a claim and is
16 dismissed.

17 *B. Wrongful Foreclosure*

18 "An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can
19 establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of
20 condition or failure or performance existed on the mortgagor's or trustor's part which would have
21 authorized the foreclose or exercise of the power of sale." *Collins v. Union Fed. Sav. & Loan Ass'n*,
22 99 Nev. 284, 304, 662 P.2d 610, 623 (Nev. 1983). "Therefore, the material issue of fact in a
23 wrongful foreclosure claim is whether the trustor was in default when the power of sale was
24 exercised." *Id.*

25 Plaintiffs admit to defaulting on their loans. (Compl. at ¶ 9). Additionally, defendant
26 received a certificate from the foreclosure mediation program that allowed it to foreclose on the
27 premises. Defendant lawfully foreclosed on the property.

28 Plaintiffs argue that defendant could not foreclose on the property because plaintiffs filed a
petition for judicial review of the mediation program. This petition was dismissed with prejudice
because it was untimely filed. The court finds plaintiffs' argument based on the petition for judicial

1 review to be meritless. Plaintiffs' wrongful foreclosure cause of action is dismissed because it fails
2 to state a claim.

3 C. Rescission

4 "Rescission is an equitable remedy which totally abrogates a contract and which seeks to
5 place the parties in the position they occupied prior to executing the contract." *Bergstrom v. Estate*
6 *of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (Nev. 1993). Upon rescission, the parties should
7 be "returned as closely as possible to their respective positions prior to entering into the contract."
8 *Id.* A non-breaching party to the contract may either seek to rescind the contract or seek damages
9 from the breach, but not both. *Id.*; see also *Fuoroli v. Westgate Planet Hollywood Las Vegas, LLC*,
10 no. 2:10-cv-2191-JCM, 2013 WL 431047, at *4 (D. Nev. Feb. 1, 2013).

11 In this case, plaintiffs have not properly alleged that they are the non-breaching party.
12 Plaintiffs have not properly alleged a breach of the contract or that the contract was void or voidable.
13 In fact, plaintiffs admit that they breach the contract by defaulting on their loans. Plaintiffs' cause
14 of action for rescission is dismissed because it fails to state a claim.

15 D. Injunction

16 In a previous order in this case, (doc. # 14), this court denied the temporary restraining order
17 filed contemporaneously with the complaint in state court. The court found that plaintiffs could not
18 establish a single required element from *Winter v. NRDC*, 555 U.S. 7, 24 (2008) ("A preliminary
19 injunction is an extraordinary remedy never awarded as a right.").

20 To begin, injunctive relief is a remedy and not a cause of action. Additionally, plaintiffs
21 cannot show irreparable harm or a high enough likelihood of success on the merits of any of the
22 causes of action.

23 Plaintiffs' for injunctive relief is dismissed because it fails to state a claim.

24 IV. Conclusion

25 Plaintiffs' causes of action for fraudulent misrepresentation, wrongful foreclosure, rescission,
26 and injunctive relief are dismissed. Plaintiffs' complaint also alleges causes of action for quiet title,
27 breach of the covenant of good faith and fair dealing, and unjust enrichment. Flagstar's motion
28

1 makes no argument pertaining to these claims, so they remain viable.

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion to
4 dismiss (doc. # 6) be, and the same hereby, is GRANTED consistent with the foregoing.

5 DATED May 17, 2013.

6
7 
8 UNITED STATES DISTRICT JUDGE